

THE GLOBAL TRADE LAW JOURNAL

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U.S. Department of State Publishes International Traffic in Arms Regulations Amendments to Implement the AUKUS Exemption

Maria Alejandra “Jana” del-Cerro and Dilan Wickrema*

In this article, the authors examine an interim final rule published by the U.S. Department of State’s Directorate of Defense Trade Controls that is intended to streamline defense trade between and among Australia, the United Kingdom, and the United States in furtherance of the countries’ trilateral security partnership, also known as the AUKUS partnership.

The U.S. Department of State’s Directorate of Defense Trade Controls (DDTC) published an interim final rule¹ to streamline defense trade between and among Australia, the United Kingdom (UK), and the United States in furtherance of the trilateral security partnership (the AUKUS partnership). The interim final rule implements the proposed rule the DDTC published on May 1, 2024, with changes, and became effective on September 1, 2024.

The DDTC issued the interim final rule pursuant to new authorities and requirements contained in Section 1343 of the National Defense Authorization Act (NDAA) for fiscal year (FY) 2024² which, in part, directs the Department of State (DoS) to immediately implement an International Traffic in Arms Regulations (ITAR) exemption, subject to certain statutory limitations, for the UK and Australia if the DoS determines and certifies that each has implemented (1) a system of export controls comparable to those of the United States, and (2) a comparable exemption from its export controls for transfers to the United States.

On August 15, 2024, the DoS issued a press release³ notifying the public that it had determined that the Australian and UK export control systems are comparable to those of the United States and have implemented reciprocal export exemptions for U.S. persons.

This determination follows Australia's implementation of new export controls on deemed exports, reexports, and services relating to controlled goods and technology.⁴

In addition, as of August 16, 2024, the United Kingdom now requires⁵ UK persons who are part of the AUKUS-authorized user community and UK companies dealing with items or technology subject to the ITAR to apply for and receive an F680 approval to release material subject to the ITAR to any foreign entity, including within the UK borders.

Further, the United Kingdom published an Open General License for AUKUS nations, and Australia amended their export control framework, to provide a national exemption for exports from each respective country to the United States. Combined, the changes implemented by Australia and the United Kingdom satisfy the requirements set out in the NDAA for FY 2024 to enable the United States to implement an ITAR AUKUS Exemption.

Key Takeaways

- *AUKUS Exemption.* The DDTC amended the ITAR to add a new exemption in Part 126 to allow exports, reexports, retransfers, or temporary imports of defense articles; the furnishing of defense services; or engaging in brokering activities between and among previously approved parties (authorized users) in Australia, the United Kingdom, and the United States (AUKUS Exemption). The AUKUS Exemption includes a number of limitations, including a new Excluded Technology List, identifying defense articles and services that are not eligible for transfer under the new exemption.
- *Changes from May 1, 2024, Proposed Rule.* The interim final rule includes several changes from the proposed rule originally published by the DDTC. Among them, the interim final rule removes the requirement for users of the new AUKUS Exemption (ITAR § 126.7) and the current Canadian exemption (ITAR § 126.5) to obtain a nontransfer and use certificate for the transfer of significant military equipment (SME) and classified defense articles. In addition, the DDTC also made several significant changes to the Excluded Technologies List to clarify entries and remove technology from the list to allow the regulated community

to conduct transfers of the technology with the AUKUS Exemption. The interim final rule also made several conforming and clarifying changes in ITAR §§ 124.8, 126.1, 126.7, 126.15, and 126.18.

- *The Overall Design of the AUKUS Exemption and Expedited Review of License Applications Remains the Same.* The AUKUS Exemption and expedited review of license applications the DDTC proposed on May 1, 2024, in ITAR §§ 126.7 and 126.15 remain largely the same in the interim final rule. The changes the DDTC made from the proposed to interim final rule for ITAR § 126.7 include removing text deemed redundant of other provisions of the ITAR and adding additional text to account for brokering activity. The DDTC also made minor changes to the new text of ITAR § 126.15(d) to align with the NDAA for FY 2024.
- *Effective Date.* The rule took effect on September 1, 2024.

Amendments to the ITAR

New AUKUS Exemption

The interim final rule amended the previously reserved ITAR § 126.7 to create the AUKUS Exemption. The AUKUS Exemption authorizes exports, reexports, retransfers, or temporary imports of defense articles (including technical data); the furnishing of defense services; or engaging in brokering activities between and among Australia, the United Kingdom, and the United States, subject to the following limitations:

1. The activity must be to or within the physical territory of Australia, the United Kingdom, or the United States;
2. The transferor, recipient, or broker must be: (a) a U.S. person registered with the applicable DDTC registration and not debarred; (b) a U.S. government department or agency; or (c) identified as an authorized user on the DDTC's website and, if engaging in brokering activities, registered with the DDTC pursuant to ITAR § 129.3;
 - The DDTC explained in the interim final rule that additional guidance will be published regarding the authorized user enrollment process for Australia and UK persons and subsequently published a series of

frequently asked questions (FAQs).⁶ It also noted that the exemption allows retransfers or reexports of defense articles originally exported under a different DDTC approval (essentially allowing a daisy chain of authorizations) so long as the transferor and recipient are authorized users, in addition to all other criteria of ITAR § 126.7. The DDTC further clarified that “anyone who has access to a defense article” would need to be an authorized end user, and while many carriers and other service providers do not require such access, freight forwarders often do.

3. The defense article or service cannot be described in Supplement No. 2, the new Excluded Technology List, which includes broad categories of items as discussed further below;
4. The value of the transfer cannot be more than the ITAR congressional notification limits;⁷
5. The transfer does not involve the manufacturing abroad of SME; and
6. Transferors must inform the end user and all consignees that the defense articles are subject to U.S. export controls.

The DDTC did remove several provisions of the proposed ITAR § 126.7 from the interim final rule. Specifically, the DDTC determined that the provisions restating basic ITAR exemption use requirements, such as maintaining records of each transfer, was redundant of other provisions already in the ITAR and thus could be removed. Significantly, the interim final rule also removed the requirement for users of the AUKUS Exemption to obtain a non-transfer and use assurance prior to transferring defense articles deemed to be SME or classified.

The DDTC also stated that any defense article produced or manufactured from U.S.-origin ITAR-controlled technical data or defense services transferred via ITAR § 126.7 may only be transferred via a DDTC license or other authorization, which may include § 126.7.

Supplement No. 2 to Part 126—Excluded Technology List

The interim final rule implemented a new Supplement No. 2 to Part 126, listing the defense articles and services excluded from the

scope of the AUKUS Exemption. The DDTC made several changes to Supplement No. 2 based on the public comments received, including:

- Removing unmanned aerial vehicle flight control systems and vehicle management systems from the Missile Technology Control Regime exclusion;
- Clarifying the anti-tamper exclusion;
- Removing the exclusion specific to source code in its entirety;
- Removing the exclusion of classified manufacturing know-how for certain articles described in Categories XI and XII of the United States Munitions List (USML);
- Removing text that excluded launchers for man-portable air defense systems;
- Removing the exclusion regarding source code and classified technical data and defense services directly related to certain night vision commodities; and
- Modifying the entry for USML Category XX manufacturing know-how to remove the exclusion for manufacturing know-how directly related to classified uncrewed vessels, and to also exclude design methodology and engineering analysis for crewed vessels, articles used only in crewed vessels, classified payloads, and classified uncrewed underwater vessel signature reduction techniques.

Expanded Exemption for Australian and UK Citizens Who Are Dual Nationals

As the DDTC proposed on May 1, 2024, the interim final rule amended ITAR § 126.18 by adding a provision to allow dual nationals of Australia or the United Kingdom and another country to receive classified defense articles without a separate license from the DDTC if the following requirements are met:

- The dual nationals must be authorized users, or “regular employees” (as defined in ITAR § 120.64) of authorized users, of the AUKUS Exemption;
- Hold a security clearance approved by Australia, the United Kingdom, or the United States that is equivalent to the classification level of SECRET or above in the United States; and

- Be located within the physical territory of Australia, the United Kingdom, or the United States or be a member of the armed forces of Australia, the United Kingdom, or the United States acting in their official capacity.

The interim final rule clarified that this new provision applies only to retransfers and reexports.

Expedited Processing of License Applications for Transfers to Australia, the United Kingdom, or Canada

The interim final rule also implements the new process to expedite the review of license applications for exports of defense articles or defense services that are not eligible for any ITAR exemption. The new expedited license review process would apply not only for license applications related to Australia and the United Kingdom but also for Canada. To qualify for expedited processing:

- The prospective export must occur wholly within or between the physical territories of Australia, the United Kingdom, Canada, or the United States, and between governments or persons from such countries; and
- The value of the license must not trigger congressional notification requirements.

Under the expedited timelines, “to the extent practicable,” applications related to a government-to-government agreement would be adjudicated within 30 days, while other applications would be adjudicated within 45 calendar days. The DDTC also noted in a new FAQ that the expedited procedures described in ITAR § 126.15 are not available if intermediate consignees listed on the license application are not Australian, UK, or Canadian persons. The DDTC also specified that license applications do not need to request expedited treatment specifically, and that the DDTC will apply the expedited licensing procedures to export license applications that qualify for expedited treatment automatically.

What’s Next?

Although the interim final rule took effect on September 1, 2024, the DDTC accepted public comments through November 18, 2024, which may result in additional amendments.

Notes

* The authors, attorneys with Crowell & Moring LLP, may be contacted at mdel-cerro@crowell.com and dwickrema@crowell.com, respectively.

1. <https://www.federalregister.gov/documents/2024/08/20/2024-18043/international-traffic-in-arms-regulations-exemption-for-defense-trade-and-cooperation-among>.

2. <https://www.congress.gov/bill/118th-congress/house-bill/2670/text>.

3. <https://www.state.gov/aukus-defense-trade-integration-determination/>.

4. <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-act-2024-defence-trade-legislation-amendment-regulations-2024#:~:text=On%2027%20March%202024%2C%20the,as%20that%20of%20key%20partners>.

5. <https://www.gov.uk/government/publications/notice-to-exporters-202417-changes-to-the-mod-form-680-process/nte202417-changes-to-the-mod-form-680-process>.

6. https://www.pmdtc.state.gov/ddtc_public/ddtc_public?id=ddtc_public_portal_faq_cat&topic=840e3f6cdb3bc30044f9ff621f9619c0&subtopic=773f21fc970012580083b3b0f053af42#773f21fc970012580083b3b0f053af42.

7. <https://www.ecfr.gov/current/title-22/chapter-I/subchapter-M/part-123/section-123.15>.